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I. INTRODUCTION

Congress's statement of findings and purposes for the Americans with Disabilities Act of 1990 ("ADA") estimated that 43 million Americans suffer from one or more physical or mental disabilities.[1] That figure has risen to 52.6 million Americans in 1997, or 19.7% of the U.S. population, according to the Census Bureau.[2] Congress also found that throughout history and in present times, people with disabilities have been isolated, segregated, and discriminated against in fundamental areas of life such as employment, housing, and education.[3] As a result, Congress enacted the ADA "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[4]

One of these areas of life that Congress chose to focus on was employment, as seen in the fact that an entire title of the ADA, Title I, is devoted to this topic. Congressional hearings referenced data that two-thirds of Americans with disabilities between the ages of 16 and 64 are unemployed despite the fact that two-thirds of these unemployed, working-age people with disabilities would like to have a job.[5]

In the wake of the enactment of the ADA in 1990, the federal courts have been working to clarify the available claims and mode of enforcement of the Act. One particular claim, disability harassment, the focus of this article, has been constantly in flux. The availability of a sexual[6] harassment claim for a hostile work environment under Title VII

1. 42 U.S.C. § 12101(a)(1) (2001).

2. JACK MCNEIL, U.S. CENSUS BUREAU, AMERICANS WITH DISABILITIES: 1997 (Feb. 2001), *available at* http://www.census.gov/hhes/www/disable/sipp/disable97.html.

3. 42 U.S.C. § 12101(a)(2)-(3) (2001).

4. *See id.*, § 12101(b)(1).

5. H.R. REP. NO. 101-485(II), at 32 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 314.

6. Preceding the development of sexual harassment claims for hostile work environment were hostile environment claims given other protected characteristics. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (race); Compston v. Borden, Inc., 424 F. Supp. 157, 161 (S.D. Ohio 1976) (religion). Sexual harassment will be the claim of

of the Civil Rights Act of 1964[7] has been evolving since 1986.[8] While several district courts have definitively held that a comparable disability harassment claim exists under the ADA,[9] it was not until 2001 that two federal circuit courts of appeals delivered such a holding.[10] Until these two perhaps critical holdings, the circuit courts of appeals had generally assumed without deciding that a disability harassment claim existed under the ADA.[11] These courts then denied every claim case-by-case as having insufficient evidence to succeed on such a claim, thus allowing avoidance of the question of the existence of a disability harassment claim.[12] Perhaps these two Courts of appeal decisions signal the start of a trend under which the federal courts will accept disability harassment claims more definitively.

While these two cases may signal growing recognition of disability harassment claims, questions remain about whether it is appropriate to utilize harassment analysis from Title VII precedent in ADA claims.[13] In certain instances, including cases of disparate treatment discrimination and retaliation, courts have applied Title VII analysis to ADA cases.[14] However, important distinctions between the two statutes indicate that such borrowing of analysis is not always appropriate.[15]

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harassment under Title VII used in this note for comparison to disability harassment because most Title VII harassment cases involve discrimination based on sex. Lisa Eichhorn, *Hostile Environment Actions, Title VII, and the ADA: the Limits of the Copy-and-Paste Function*, 77 WASH. L. REV. 575, 580 (July 2002).

7. 42 U.S.C. § 2000e, et. seq (2001).

8. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 66 (1986).

9. *See, e.g.*, Lanni v. State, 177 F.R.D. 295, 304 (D. N.J. 1998); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1106-07 (S.D. Ga. 1995); Davis v. York Int'l Inc., No. CIV.A. HAR 92-3545, 1993 WL 524761, at *9-10 (D. Md. 1993).

10. Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 232 (5th Cir. 2001); Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001).

11. *See, e.g.*, Vollmert v. Wis. Dep't of Transp., 197 F.3d 293, 297 (7th Cir. 1999); Walton v. Mental Health Ass'n of S.E. Pa., 168 F.3d 661, 666-67 (3d Cir. 1999); Wallin v. Minn. Dep't of Corr., 153 F.3d 681, 687-88 (8th Cir. 1998); McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998).

12. *See supra* note 11.

13. *See, e.g.*, Eichhorn, *supra* note 6, at 578-80 (asserting that Title VII framework should not be applied to hostile work environment claims under the ADA because each statute employs very different visions of equality and discrimination); Christine Neagle, *An Analysis of the Applicability of Hostile Work Environment Liability to the ADA*, 3 U. PA. J. LAB. & EMP. L. 715, 728 (2001) (describing argument that in order to effectuate the goals of the ADA, a disability harassment claim must be recognized); Frank S. Ravitch, *Beyond Reasonable Accommodation: the Availability and Structure of a Cause of Action for Workplace Harassment Under the Americans with Disabilities Act*, 15 CARDOZO L. REV. 1475, 1522 (1994) (encouraging a modified Title VII analysis of disability harassment claims under the ADA, incorporating the concept of reasonable accommodation and its defenses).

14. *See infra* notes 66-67 and accompanying text.

15. *See infra* notes 68-72 and accompanying text.

This article discusses whether courts should recognize a disability harassment claim under Title I of the ADA, and if so, whether courts should adopt the same analysis as that which is applied to harassment claims under Title VII of the Civil Rights Act of 1964. Part II provides history for this topic by investigating whether these two statutes have analogous visions of employment discrimination as seen through statutory text and legislative history. Part II also outlines the types of employment discrimination claims available under both Title VII and the ADA and discusses which ADA claims are evaluated through adopting Title VII analysis. Part III focuses on the topic of disability harassment by first summarizing how the courts have addressed disability harassment claims so far. Part III then explores whether Title VII harassment analysis, employed primarily in sexual harassment cases, coincides with the purposes and text of the ADA. Next, Part IV proposes a resolution to this issue by suggesting a reasonable victim analysis for disability harassment claims after discussing several standards that have been debated in the harassment context. Finally, Part V provides some further support for allowing disability harassment claims under the ADA.

II. HISTORY

According to the legislative history for Title VII, the purpose of the Civil Rights Act of 1964 was to establish "a congressionally declared national policy of nondiscrimination, based on race, color, religion, sex, or national origin in matters of promotion and employment."[16] Similarly, the text of the statute specifies one purpose of the ADA is, "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities."[17]

A. Employment Discrimination Under Title VII and the ADA: Statutory Language

Although Title VII was passed in 1964, legislative attempts to address employment discrimination based on characteristics including the five covered in that Act had been developing in decades prior to 1964. Perhaps the earliest regulation was in the Civil Service Act of 1883, which included a ban on religious discrimination in federal employment.[18] Further regulation in this area developed, including provisions in New Deal legislation, executive orders addressing

16. U.S. EQUAL EMP. OPP. COMM'N, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 3119 (1968) [hereinafter LEGISLATIVE HISTORY].

17. 42 U.S.C. § 12101(b)(1) (2001).

18. LEGISLATIVE HISTORY, *supra* note 16, at 1.

government contracts, and state fair employment practice laws.[19] This history reveals a national awareness of the need to develop a policy addressing employment discrimination on the basis of minority and gender status, eventually culminating in the Civil Rights Act of 1964 and its later amendments.

Title I of the ADA and Title VII of the Civil Rights Act of 1964 have shared visions of civil rights protection as shown by the statutory text and legislative history of the ADA. For example, the ADA explicitly states that specific enforcement provisions under Title VII are to serve also as the powers, remedies and procedures of Title I.[20] In addition, the ADA incorporates by reference the definitions of "employee" and "employer" from Title VII.[21] More broadly, the House Judiciary Committee stated: "The Americans With Disabilities Act completes the circle begun in 1973 with respect to persons with disabilities by extending to them the same civil rights protections provided to women and minorities beginning in 1964."[22]

Nonetheless, given key differences between the two statutes, the whole of Title VII analysis has not been applied to ADA claims. First and most importantly, the prohibition of discrimination under the ADA includes an affirmative duty to reasonably accommodate, limited by an affirmative defense where such accommodation would cause an undue hardship on the employer.[23] The term "reasonable accommodation" can also be found in Title VII, in a much different context.[24] Title VII incorporates reasonable accommodation within its definition of one protected class, religion: "The term 'religion' includes all aspects of religious observance and practice, as well as belief, unless an employer demonstrates that he is unable to reasonably accommodate to an

19. *Id.* at 1-6.

20. 42 U.S.C. § 12117(a) (2001).

21. H.R. REP. NO. 101-485(II), at 76 (1990), *reprinted in* 1990 U.S.C.C.A.N. 303, 359.

22. H.R. REP. NO. 101-485(III), at 26 (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 449. In fact, the U.S. Commission on Civil Rights has stated that, "[T]he Civil Rights Act of 1964 served as a model for future civil rights laws, including the ADA." U.S. COMM'N ON CIVIL RIGHTS, HELPING EMPLOYERS COMPLY WITH THE ADA, 15 (1998) [hereinafter HELPING EMPLOYERS].

23. 42 U.S.C. § 12112(b)(5) (2001). This provision provides:

> (5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
>
> (5)(B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to make reasonable accommodation to the physical or mental impairments of the employee or applicant.

Id.

24. *See* Pamela S. Karlan & George Rutherglen, *Disabilities, Discrimination, and Reasonable Accommodation*, 46 DUKE L.J. 1, 6-7 (1996).

employee's or prospective employee's religious observance or practice without undue hardship on the conduct of the employer's business."[25]

In order to avoid a conflict with the Establishment Clause of the First Amendment, however, the Supreme Court limited this duty to reasonably accommodate religion under Title VII by recognizing that any cost greater than a *de minimis* cost constitutes an undue hardship negating the duty.[26] In contrast, reasonable accommodation under the ADA can have a much greater cost to employers, although the precise breadth of the duty has yet to be clearly defined by the courts.[27]

Second, the provisions of the ADA only can be invoked by a "qualified individual with a disability," which is defined as, "an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires."[28] "Disability" is defined as: "(A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such impairment; or (C) being regarded as having such an impairment."[29] The U.S. Supreme Court recently clarified the meaning of part A of this definition of disability under the ADA. The Court held: "to be substantially limited in performing manual tasks, an individual must have an impairment that prevents or severely restricts the individual from doing activities that are of central importance to most people's daily lives. The impairment's impact must also be permanent or long term."[30] The evaluation of disability is frequently done on a case-by-case basis because symptoms of some disabilities and illnesses can vary widely.[31]

In contrast, the discrimination provision of Title VII applies to "any individual" who is discriminated against "because of such individual's

25. 42 U.S.C. § 2000e(j) (2001).

26. Trans World Airlines v. Hardison, 432 U.S. 63, 84 (1977); *see also* Karlan & Rutherglen, *supra* note 24, at 7.

27. Karlan & Rutherglen, *supra* note 24, at 8. The ADA's definition of reasonable accommodation indicates its potentially extensive scope:

The term "reasonable accommodation" may include—

> (A) making existing facilities used by employees readily accessible to and usable by individuals with disabilities; and
>
> (B) job restructuring, part-time or modified work schedules, reassignment to a vacant position, acquisition or modification of equipment or devices, appropriate adjustment or modifications of examinations, training materials or policies, the provision of qualified readers or interpreters, and other similar accommodations for individuals with disabilities.

42 U.S.C. § 12111(9) (2001).

28. 42 U.S.C. § 12111(8) (2001).

29. 42 U.S.C. § 12102(2) (2001).

30. Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184, 198 (2002).

31. *Id.*at 199.

race, color, religion, sex, or national origin."[32] While evidence and analysis is needed to establish disability for ADA claims, whether an individual falls under one of the five protected classes under Title VII is usually self-evident.

There also are important similarities, particularly in the provisions relevant to claims of harassment, between the two statutes. According to the EEOC,[33] Title VII § 703(a)(1) expressly proscribes sexual harassment, stating: "It shall be unlawful employment practice for an employer – to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[34]

The prohibition of discrimination in Title I of the ADA utilizes similar language: "No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."[35]

Given these important textual similarities between Title VII and the ADA, it is useful to evaluate the way these statutes are applied by the courts.

B. Types of Employment Discrimination Claims Available Under Title VII

Title VII of the Civil Rights Act of 1964 provides statutory authority to support several types of employment discrimination claims. One claim supported by Title VII is that of invidious discrimination because of race, color, religion, sex, or national origin—the five characteristics covered by the Act—as shown through direct evidence.[36] Direct evidence can be particularly effective in convincing the fact finder that discrimination occurred; this method of proof is not frequently used, however, because employee-plaintiffs rarely have such evidence to present.[37]

32. 42 U.S.C. § 2000e-2(a)(1) (2001).

33. Policy Guidance on Current Issues of Sexual Harassment, Notice 915-050 (Equal Emp. Opp. Comm'n Mar. 19, 1990), *available at* U.S. EQUAL EMP. OPP. COMM'N, SEX DISCRIMINATION ISSUES: EMPLOYMENT DISCRIMINATION PROHIBITED BY TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED AND THE EQUAL PAY ACT OF 1963, C-1 (1996) [hereinafter SEX DISCRIMINATION].

34. 42 U.S.C. § 2000e-2(a)(1) (2001).

35. 42 U.S.C. § 12112(a) (2001).

36. Wards Cove Packing Co., Inc. v. Atonio, 490 U.S. 642, 670 (1989).

37. *Id.*

In 1971, the United States Supreme Court confirmed the availability of a second type of claim under Title VII, a claim of discrimination shown through disparate impact.[38] In *Griggs v. Duke Power Co.*,[39] a group of "incumbent Negro employees" working at a power-generating facility challenged the validity of the employer requiring a high-school degree or passage of a standardized general intelligence test in order to receive employment.[40] Under a disparate impact theory recognized in *Griggs*, an employer is proscribed from implementing practices that are facially fair but discriminatory in effect, regardless of the employer's intent, unless the practice is sufficiently related to business necessity.[41]

Only two years later, the Supreme Court explained a third claim under Title VII, proof of discrimination through individual disparate treatment.[42] In *McDonnell Douglas v. Green*,[43] the respondent, an African-American civil-rights activist, following his participation in a "lock-in" protest, claimed that his discharge was racially motivated rather than a part of a general work force reduction as claimed by the employer.[44] The Court developed a burden-shifting analysis for use in analyzing disparate treatment claims: first, the complainant faces a burden of proving a *prima facie* case of racial discrimination;[45] if met, the burden then shifts to the employer to provide a legitimate, nondiscriminatory justification for the challenged action; if met, the burden finally shifts back to the complainant to demonstrate that the employer's justification is only a pretext for unlawful discrimination.[46]

38. Griggs v. Duke Power Co., 401 U.S. 424, 431-33 (1971).

39. 401 U.S. 424 (1971).

40. *Id.* at 425-26.

41. *Id.* at 431-32. The statutory authority for disparate impact claims under Title VII is found in Section 703(a)(2) which prohibits employers from: "limit[ing], segregat[ing], or classify[ing] [their] employees or applicants for employment in any way which would deprive or tend to deprive any individual or employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(2) (2001).

42. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 807 (1973).

43. 411 U.S. 792 (1973).

44. *Id.* at 794-95.

45. The Court outlined four steps to establishing a *prima facie* case of discrimination appropriate under the facts:

> (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. at 802. The Court also noted that differing factual situations may demand alterations to this test. *Id.* at 802 n.13.

46. *Id.* at 802-04. The statutory authority for disparate treatment claims under Title VII is found in Section 703(a)(1) which makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his

Around the time of these landmark Supreme Court cases, lower federal courts were laying the foundation for a fourth type of claim under Title VII, harassment.[47] While these examples of early cases concerned race and religion, there since has been much greater development of harassment claims through claims of sexual harassment. There are two recognized types of harassment prohibited under Title VII: quid pro quo harassment and hostile work environment harassment.[48] Quid pro quo harassment exists when "submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual."[49] In contrast, hostile work environment harassment is present when "unwelcome sexual conduct . . . 'unreasonably interfer[es] with an individual's job performance' or creates an 'intimidating, hostile, or offensive working environment' . . . even if it leads to no tangible or economic job consequences."[50] The Supreme Court in *Meritor Savings Bank v. Vinson*[51] confirmed that both types of harassment are prohibited by Section 703(a)(1) of Title VII.[52]

Finally, Title VII also supports retaliation claims.[53] In order to establish a *prima facie* case of retaliation, the plaintiff must establish three elements: first, that she was participating in a "statutorily protected activity;" second, that the employer made an adverse employment decision against her; and finally, that the first two elements are causally linked.[54]

C. Types of Employment Discrimination Claims Available Under the ADA

Several of these Title VII concepts are present in ADA analysis. Although a complex statute, Title I of the ADA can be best summarized

compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a)(1) (2001).

47. *See, e.g.*, Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972) (holding that a hostile work environment because of race violated Section 703(a)(1) of Title VII); Compston v. Borden, Inc., 424 F. Supp. 157, 161 (S.D. Ohio 1976) (finding that a hostile work environment because of religion violated Section 703(a)(1) of Title VII).

48. SEX DISCRIMINATION, *supra* note 33, at C-2.

49. *Id.* (quoting 29 C.F.R. § 1604.11(a)(2) (2002)). For case law examples of quid pro quo harassment, *see, e.g.*, Miller v. Bank of Am., 600 F.2d 211, 212 (9th Cir. 1979) (alleging plaintiff was terminated when she refused to accept her supervisor's sexual advances); Barnes v. Costle, 561 F.2d 983, 984-85 (D.C. Cir. 1977) (alleging plaintiff's job was eradicated after she refused to cooperate with her supervisor's sexual advances).

50. SEX DISCRIMINATION, *supra* note 30, at C-2 (quoting 29 C.F.R. § 1604.11(a)(3) (2002)).

51. 477 U.S. 57 (1986).

52. *Id*. at 65-66. For the text of Section 703(a)(1), *see supra* note 46.

53. *See, e.g.*, Brown v. Brody, 199 F.3d 446, 452 (D.C. Cir. 1999).

54. *Id.*

as prohibiting employment discrimination against people with disabilities and affirmatively requiring employers to provide disabled people with reasonable accommodations when providing such accommodation would not pose an undue hardship on the business.[55] Following a general proscription of discrimination, Title I lists seven examples of actions that are included in the definition of "discrimination," none of which explicitly mention harassment.[56] Therefore, there is no explicit textual reference to disability harassment as a prohibited form of discrimination.

55. DAVID WOLOWITZ & MICHAEL O'CONNOR, THE GUIDEBOOK OF LAWS AND PROGRAMS FOR PEOPLE WITH DISABILITIES, 6-1-1, 6-1-3 (2000).

56. 42 U.S.C. § 12112(b)(1) – (7) (2001). These provisions in full indicate that "discrimination" includes:

> (1) limiting, segregating, or classifying a job applicant or employee in a way that adversely affects the opportunities or status of such applicant or employee because of the disability of such applicant or employee;
> (2) participating in a contractual or other arrangement or relationship that has the effect of subjecting a covered entity's qualified applicant or employee with a disability to the discrimination prohibited by this subchapter (such relationship includes a relationship with an employment or referral agency, labor union, an organization providing fringe benefits to an employee of the covered entity, or an organization providing training and apprenticeship programs);
> (3) utilizing standards, criteria, or methods of administration –
> that have the effect of discrimination on the basis of disability; or
> that perpetuate the discrimination of others who are subject to common administrative control;
> (4) excluding or otherwise denying equal jobs or benefits to a qualified individual because of the known disability of an individual with whom the qualified individual is known to have a relationship or association;
> (A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or
> (B) denying employment opportunities to a job applicant or employee who is an otherwise qualified individual with a disability, if such denial is based on the need of such covered entity to made reasonable accommodation to the physical or mental impairments of the employee or applicant;
> (6) using qualification standards, employment tests or other selection criteria that screen out or tend to screen out an individual with a disability or a class of individuals with disabilities unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity; and
> (7) failing to select and administer tests concerning employment in the most effective manner to ensure that, when such test is administered to a job applicant or employee who has a disability that impairs sensory, manual, or speaking skills, such test results accurately reflect the skills, aptitude, or whatever other factor of such applicant or employee that such test purports to measure, rather than reflecting the impaired sensory, manual, or speaking skills of such employee or applicant (except where such skills are the factors that the test purports to measure).

Id.

The EEOC, in interpreting the ADA and providing guidance on ADA enforcement, has expanded this list slightly.[57]

However, this statutory subsection does not purport to present an all-inclusive list of forms of discrimination prohibited by Title I of the ADA. In fact, through September 1998, the EEOC has compiled data on suits that reveal that 47 different types of issues have been raised under the ADA.[58] Among these 47 issues, harassment due to disability was the fourth most common claim raised, totaling 6.8% of ADA charges.[59]

Court analysis of claims under the ADA has often followed the Title VII model. In cases brought under the ADA, courts have described the two main routes of proof of discrimination as being through direct evidence and through indirect evidence. These court rulings mirror the Title VII dichotomy between direct evidence and disparate impact/disparate treatment.[60] The U.S. Supreme Court has recognized that the ADA, like Title VII, explicitly "forbids 'utilizing standards, criteria, or methods of administration' that *disparately impact* the disabled, without regard to whether such conduct has a rational basis."[61] The claim for retaliation under the ADA also mirrors Title VII precedent.[62] Nevertheless, by far the greatest borrowing of the *McDonnell Douglas* burden-shifting standard for disparate treatment claims has occurred in ADA analysis.

57. *See* U.S. EEOC, DISABILITY DISCRIMINATION: EMPLOYMENT DISCRIMINATION PROHIBITED BY THE AMERICANS WITH DISABILITIES ACT OF 1990, at I-4 (1998) [hereinafter DISABILITY DISCRIMINATION]. In addition to the seven examples provided in the text of the ADA, the EEOC also lists retaliation: "Discriminating against an individual because s/he has opposed an employment practice of the employer or filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing to enforce provisions of the Act." *Id.* Finally, and most notably for the purposes of this Note: "EEOC also considers 'disability harassment' a form of discrimination under the ADA." HELPING EMPLOYERS, *supra* note 22, at 79.

58. HELPING EMPLOYERS, *supra* note 22, at 284-85. These issues include, in descending order of frequency: discharge, reasonable accommodation, terms and conditions, harassment, hiring, other, discipline, layoff, promotion, wages, demotion, constructive discharge, reinstatement, suspension, benefits, intimidation, sexual harassment, assignment, recall, benefits—insurance, training, union representation, prohibited medical inquiry/exam, retirement involuntary, job classification, references unfavorable, exclusion, benefits—retirement/pension, referral, seniority, qualifications, maternity, testing, tenure, record keeping violation, severance pay denied, filing EEO forms, apprenticeship, advertising, early retirement incentive, segregated facilities, posting notice, waiver of ADEA suit rights, paternity, other language/accent issue, segregated locals, English language only rule. *Id.*

59. *Id.* at 284.

60. *See, e.g.*, Stone v. City of Indianapolis Pub. Utils. Div., 281 F.3d 640, 644 (7th Cir. 2002).

61. Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 372 (2001) (quoting 42 U.S.C. § 12112(b)(3)(A) (2001)) (emphasis added).

62. *See, e.g.*, Soileau v. Guilford of Me., Inc., 105 F.3d 12, 16 (1st Cir. 1997).

D. ADA Employment Discrimination Claims Borrowing Title VII Burden-Shifting Analysis

Almost all of the federal circuit courts of appeals have considered whether to apply the *McDonnell Douglas* burden-shifting analysis,[63] first developed for Title VII claims, to various ADA claims.[64] Generally speaking, nine circuits have applied that burden-shifting analysis to disability discrimination claims based on disparate treatment, through indirect evidence.[65] In addition, courts have utilized past analysis from Title VII retaliation claims in similar claims arising under the ADA.[66]

Courts have, however, recognized that important differences between Title VII and the ADA render the application of Title VII analysis to ADA claims inappropriate in certain circumstances.[67] These differences justify the assertion by courts that Title VII analysis cannot be incorporated wholesale in ADA cases.[68] Where the employer has acted, and claims that this action was unrelated to the employee's disability, application of the *McDonnell Douglas* burden-shifting analysis is more appropriate.[69] Title VII is based on the premise that, in most circumstances, it is impermissible to make employment decisions based on its covered factors: race, color, religion, sex, and national origin.[70] In

63. *See supra* notes 45-46 and accompanying text.

64. *See, e.g.*, *Soileau*, 105 F.3d at 16..

65. *See* Snead v. Metro. Prop. & Cas. Ins. Co., 237 F.3d 1080, 1093 (9th Cir. 2001); Parry v. Mohawk Motors of Mich., Inc., 236 F.3d 299, 310 (6th Cir. 2000); Earl v. Mervyns, Inc., 207 F.3d 1361, 1365 (11th Cir. 2000); Butler v. City of Prairie Village, Kan., 172 F.3d 736, 747 (10th Cir. 1999); Price v. S-B Power Tool, 75 F.3d 362, 364-65 (8th Cir. 1996); Daigle v. Liberty Life Ins. Co., 70 F.3d 394, 396 (5th Cir. 1995); Newman v. GHS Osteopathic, Inc., Parkview Hosp. Div., 60 F.3d 153, 156-57 (3d Cir. 1995); Ennis v. Nat'l Ass'n of Bus. & Educ. Radio, Inc., 53 F.3d 55, 57-58 (4th Cir. 1995); DeLuca v. Winer Indus., Inc., 53 F.3d 793, 797 (7th Cir. 1995).

66. *See, e.g.*, *Soileau*, 105 F.3d at 16.

67. *See, e.g.*, Aka v. Wash. Hosp. Ctr., 116 F.3d 876, 885 (D.C. Cir. 1997) ("[T]here are significant differences between certain types of disability-based discrimination and other categories of employment discrimination, and thus the *McDonnell Douglas* framework should not be reflexively applied to ADA cases, but should be preceded by a careful consideration of its appropriateness to the particular disability discrimination claim. . . ."). For an in-depth discussion of this issue, *see* Kevin W. Williams, Note, *The Reasonable Accommodation Difference: the Effect of Applying the Burden Shifting Frameworks Developed Under Title VII in Disparate Treatment Cases to Claims Brought Under Title I of the Americans with Disabilities Act*, 18 BERKELEY J. EMP. & LAB. L. 98 (1997).

68. *See, e.g.*, *Ennis*, 53 F.3d at 59 (4th Cir. 1995) ("Although we accept the *McDonnell Douglas* framework as a useful tool, it should not be applied in a 'rigid, mechanized, or ritualistic' manner. The paradigm is merely a means to fine-tune the presentation of proof and, more importantly, to sharpen the focus on the ultimate question—whether the plaintiff successfully demonstrated that the defendant intentionally discriminated against her." (citation omitted)).

69. *See Aka*, 116 F.3d at 886; Williams, *supra* note 67, at 113-14, 129-30.

70. LEGISLATIVE HISTORY, *supra* note 16, at 3119-20 ("The avowed purpose of title VII of the bill is to eliminate . . . discrimination in employment on account of race, color, religion, sex, or national origin . . . . In contrast, it would not constitute an unlawful employment practice to hire a

contrast, an important provision of the ADA requires employers to consider disability in the affirmative requirement of reasonable accommodation.[71] Given this important distinction, most courts facing the issue have refused to apply the *McDonnell Douglas* burden-shifting analysis to a claim regarding an employer's failure to reasonably accommodate under the ADA.[72]

This brief summary and comparison of the ADA and Title VII reveals many important parallels and differences between the language, purpose, and intent of the two statutes. Therefore, greater analysis of harassment specifically is needed to explore the suitability of a potential disability harassment claim.

III. ANALYSIS

The fact that all ADA claims have not been analyzed under Title VII precedent should not be determinative of the appropriateness of a disability harassment claim under the ADA. There are, however, important differences between the provisions of the ADA and of Title VII and important differences between the nature of each statute's protected class(es). These differences should be explored in order to determine whether the framework used by courts in evaluating sexual harassment claims under Title VII can be used in the same or a modified form when analyzing disability harassment claims. But even before the legal tests are explored, these two statutes must be examined to see whether the intent and purpose behind each statute is sufficiently similar to justify the transfer of Title VII sexual harassment precedent to disability harassment claims.

A. Overview of Court of Appeals & District Court Treatment of Disability Harassment Claims

A useful starting point in evaluating these two statutes is to examine how courts have dealt with disability harassment claims so far. There has been a split in the way the lower courts have addressed disability harassment claims under the ADA. There are four general categories into which the federal courts fall: 1) expressly holding that a claim for

person of a particular religion, sex, or national origin in those *limited* circumstances where religion, sex, or national origin is a bona fide occupational qualification.") (emphasis added).

71. 42 U.S.C. § 12112(b)(5) (2000). For full text of this provision, *see supra* note 56.

72. *See, e.g.*, Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 264 (1st Cir. 1999); Bultemeyer v. Fort Wayne Cmty. Sch., 100 F.3d 1281, 1283 (7th Cir. 1996); *but see* Benson v. Northwest Airlines, Inc., 62 F.3d 1108, 1112 (8th Cir. 1995) (applying a modified burden-shifting analysis to a failure to reasonably accommodate claim).

disability harassment exists under the ADA;[73] 2) assuming without deciding that such a claim exists, then denying the claim for insufficient evidence;[74] 3) considering such a claim without expressly discussing whether such a claim exists, then denying the claim for insufficient evidence;[75] and 4) as yet having no published opinions on point.[76] Each category will be considered briefly in turn below.

1. Courts expressly holding that a claim for disability harassment exists under the ADA

Very recently and very notably, two federal circuit courts expressly held that disability harassment claims are cognizable under the ADA.[77] Prior to these two cases, the federal circuit courts of appeals had avoided the issue.[78] In contrast, the federal district courts, from a variety of jurisdictions, have expressly held that disability harassment claims are cognizable under the ADA on numerous occasions.[79] Both federal circuit courts of appeals cases include reasoned analysis to justify their holdings.

In *Fox v. General. Motors Corp.*,[80] plaintiff Robert Fox was restricted by his doctor to "light-duty work" because of his non-work related back injury for his job at a General Motors plant.[81] Fox encountered resentment and complaints about his requests for accommodations in compliance with his doctor's recommendation.[82] For example, although Fox could complete several jobs within his department, his general foreman kept assigning him to jobs he could not do. The foreman also made derogatory comments about Fox.[83]

73. *See infra* notes 77-95 and accompanying text.

74. *See infra* notes 96-103 and accompanying text.

75. *See infra* notes 104-10 and accompanying text.

76. *See infra* notes 111-19 and accompanying text.

77. Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 232 (5th Cir. 2001); Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001).

78. *See infra* notes 96-103 and accompanying text.

79. *See, e.g.*, Ballard v. Healthsouth Corp., 147 F. Supp. 2d 529, 536 (N.D. Tex. 2001) (following *Flowers* in expressly recognizing disability harassment as a cognizable claim); Vendetta v. Bell Atl. Corp., No. CIV.A.97-4838, 1998 WL 575111, at *9 (E.D. Pa. 1998); Hendler v. Intelecom U.S.A., Inc., 963 F. Supp. 200, 208 (E.D. N.Y. 1997); Chua v. St. Paul Fed. Bank for Sav., 1996 WL 312079, at *4 (N.D. Ill. 1996); Haysman v. Food Lion, Inc., 893 F. Supp. 1092, 1108-09 (S.D. Ga. 1995); Mannell v. Am. Tobacco Co., 871 F. Supp. 854, 860 (E.D. Va. 1994); Davis v. York Int'l Inc., 1993 WL 524761, at *9 (D. Md. 1993).

80. 247 F.3d 169 (4th Cir. 2001).

81. *Id.* at 172-73.

82. *Id.* at 173.

83. *Id.* For example, when Fox told his supervisor he could not do a certain task because of his medical limitations, his supervisor responded, "I don't need any of you handicapped M——-F——'s. As far as I am concerned, you can go the H—- home." *Id.* According to Fox, similar verbal

The Fourth Circuit began its analysis by responding to defendant's contention that disability harassment is not a cognizable claim under the ADA.[84] The court first noted that the Supreme Court recognized a hostile work environment claim under the proscription of discrimination in Title VII based on very similar language to the "terms, conditions, and privileges of employment" language of the ADA.[85] Because this language had been interpreted by the Supreme Court in this way under Title VII prior to the enactment of the ADA, the court assumed that the use of almost identical language in the ADA demonstrated a congressional intent to include a parallel harassment claim under the ADA.[86] Finally, the court noted the similarity in purpose between the two statutes and the examples of courts borrowing Title VII analysis with reference to ADA claims as further support for the holding.[87]

In *Flowers v. South. Regional Physician Services. Inc.*,[88] the Fifth Circuit similarly held that a disability harassment claim is actionable under the ADA almost contemporaneously with the *Fox* case.[89] In *Flowers*, plaintiff Sandra Flowers worked as a medical assistant.[90] In March 1995, Flowers' supervisor learned that she was HIV positive; she was terminated in November 1995.[91] In a charge filed with the EEOC, Flowers alleged that she was terminated because of her disability and that she was subject to harassing actions meant to either encourage her to resign or to cast her "in a false light" for the purpose of terminating her.[92]

In addressing the existence of a disability harassment claim under the ADA, the Fifth Circuit first acknowledged that other circuits have denied such claims, usually after assuming without deciding that such a claim is actionable.[93] The *Flowers* court, like the *Fox* court, noted that the

harassment occurred on a "constant" basis, from several co-workers as well as his supervisor. *Id.* at 174.

84. *Id.* at 175-76.

85. *Id.* at 175.

86. *Id.* For examples of this interpretation by the Supreme Court, see Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); and Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64-66 (1986). The ADA proscribes discrimination as to "terms, conditions, *and* privileges of employment," 42 U.S.C. § 12112(a) (2001) (emphasis added), while the Title VII prohibits discrimination as to "terms, conditions, *or* privileges of employment." 42 U.S.C. § 2000e-2(a)(1) (2001) (emphasis added).

87. *Fox*, 247 F.3d at 176; *see also supra* notes 16-17, 63-64 and accompanying text.

88. 247 F.3d 229 (5th Cir. 2001).

89. *Flowers*,247 F.3d 229, 232 (5th Cir. 2001). The *Flowers* case was decided March 30, 2001. *Id.* at 229. The *Fox* case was decided April 13, 2001. *Fox*, 247 F.3d at 169.

90. *Flowers*, 247 F.3d at 231.

91. *Id.*

92. *Id.* at 231-32.

93. *Id.* at 232-33. The court characterizes the Sixth Circuit's analysis in *Keever v. Middletown*, 145 F.3d 809 (6th Cir. 1998), as "implicitly" recognizing such a claim "albeit with no analysis." *Flowers*, 247 F.3d at 233 n.2; *see also infra* notes 96-103 and accompanying text.

virtually identical statutory provision concerning terms, conditions and privileges justified a consistent application of these provisions through recognizing a disability harassment claim under basic principles of statutory interpretation.[94] In addition, the court pointed to holdings of federal district courts recognizing the claim as well as the similarity in purpose and remedial framework between the ADA and Title VII as further support that disability harassment is a cognizable claim under the ADA.[95]

2. Courts assuming without deciding that a disability harassment claim exists, then denying the claim for insufficient evidence

Several circuit courts of appeals have taken this second approach to disability harassment claims, including the Third, Seventh, Tenth, and perhaps Eighth Circuits.[96] For example, in *Walton v. Mental Health Ass'n of South East Pennsylvania.*,[97] plaintiff Sandra Walton worked for defendant, an advocacy organization for people with mental illnesses; Walton herself suffered from the disability of depression.[98] Walton alleged that certain comments and actions by her supervisor constituted harassment, including, for example, repeated phone calls while Walton was hospitalized inquiring when she would return to work.[99]

In analyzing whether to recognize a disability harassment claim under the ADA, the Third Circuit first noted that the ADA contains language almost identical to that which the Supreme Court has held supports a hostile work environment claim under Title VII.[100] The court went on to describe the standard that would apply to such a claim, mirroring the Title VII standard.[101] Applying this standard, the court deduced that a reasonable jury could not find that harassment had taken

94. *Flowers*, 247 F.3d at 233; *see also supra* note 83.

95. *Flowers*, 247 F.3d at 234-35; *see also supra* notes 16-17 and accompanying text.

96. *See, e.g.*, Steele v. Thiokol Corp., 241 F.3d 1248, 1253 (10th Cir. 2001); Vollmert v. Wis. Dep't of Transp., 197 F.3d 293, 297 (7th Cir. 1999); Walton v. Mental Health Ass'n of S.E. Pa., 168 F.3d 661, 666-67 (3d Cir. 1999); Moritz v. Frontier Airlines, Inc., 147 F.3d 784, 788 (8th Cir. 1998). The position of the Eighth Circuit is unclear, or perhaps inconsistent, as noted by other courts. The Seventh Circuit notes that the 1998 *Moritz* case, cited above, assumes without deciding that a disability harassment claim exists, and then denies the claim on the merits. Silk v. City of Chicago, 194 F.3d 788, 803-804 & n.15 (7th Cir. 1999). However, the *Silk* court also points to the Eighth Circuit's 1998 *Cody* case, *see infra* notes 104-05 and accompanying text, as an example of a case in which a court recognizes a disability harassment claim, "without discussion," before affirming summary judgment for the employer. *Silk*, 194 F.3d at 803 & n.14.

97. 168 F.3d 661 (3d Cir. 1999).

98. *Id.* at 664.

99. *Id.* at 667 & n.4.

100. *Id.* at 666; *see also supra* note 83 and accompanying text.

101. *Walton*, 168 F.3d at 667.

place. Therefore, the court chose to assume without deciding that such a claim could exist.[102] This case is representative of other federal circuit courts of appeals cases within this category.[103]

3. Courts considering a disability harassment claim without expressly deciding whether such a claim exists, then denying the claim for insufficient evidence

Two circuits, the Sixth and perhaps the Eighth, fall into this third category of approaches to disability harassment claims.[104] In *Keever v. City of Middletown*,[105] the Sixth Circuit, within a single paragraph, mentions the alleged disability harassment claim denied below upon motion for summary judgment, and affirms this denial with no discussion of whether such a claim is cognizable under the ADA.[106]

While the Eighth Circuit analyzed the disability harassment claim in more depth than the Sixth Circuit did in the *Keever* case, the Eighth Circuit similarly skipped the step of justifying the existence of such a claim in *Cody v. Cigna Healthcare of St. Louis, Inc*.[107] The court simply stated: "The ADA prohibits employment discrimination against a qualified individual because of a disability. (citation omitted) In all constructive discharge and harassment cases under the ADA . . . the plaintiff must first make out a prima facie case of discrimination or face dismissal of her claim."[108]

Perhaps it is inaccurate to conclude that these two decisions constitute an additional category of analysis of disability harassment claims independent of the second category, assuming such a claim exists without so deciding because of insufficient evidence to succeed on the claim. After all, three years after the *Cody* and *Keever* cases, the Tenth Circuit contended: "No federal appellate court has yet directly ruled on whether a hostile work environment claim can even be brought under the ADA."[109] However these two cases should be interpreted, they certainly

102. *Id.* at 666-67.

103. *See supra* note 96 and accompanying text.

104. *See supra* and *infra* notes 96, 105-10 and accompanying text.

105. 145 F.3d 809 (6th Cir. 1998).

106. *Id.* at 813. The analysis of the disability harassment claim, in its entirety: "Keever has failed to establish any facts concerning whether the harassment he claims took place was severe enough to create an objectively hostile work environment. Conversations between an employee and his superiors about his performance does not constitute harassment simply because they cause the employee distress." *Id.* For another court's interpretation of this case, *see infra* note 106 and accompanying text.

107. Cody v. Cigna Healthcare of St. Louis, Inc., 139 F.3d 595, 598 (8th Cir. 1998).

108. *Id*. (citations omitted).

109. Steele v. Thiokol Corp., 241 F.3d 1248, 1252 (10th Cir. 2001). This statement is not inconsistent with the *Fox* and *Flowers* cases, *see supra* notes 77-92 and accompanying text, because

fall short of explicit recognition of a disability harassment claim under the ADA comparable to that in the *Fox* and *Flowers* cases,[110] and thus are less significant in the determination of whether such a claim should in fact exist.

4. Courts having no published opinions about disability harassment

Five circuits, including the First, Second, Ninth, Eleventh, and D.C. Circuits, fall into this final category.[111] While such a category at first glance seems uninformative, there may be more to the story than the simple fact that such claims have not been raised yet in these jurisdictions.[112]

One reason for the lack of precedent in these jurisdictions is that many disability harassment claims have been dismissed for procedural reasons,[113] and so presumably are not published because they would add little to the body of law. But even more interesting is a second reason: cases addressing the cognizance of a disability harassment claim may not be selected for publication so that the decisions lack binding force and need not be reconciled with other unpublished cases.[114] Of course it is impossible to discern conclusively the motivations behind these publication decisions.

Nonetheless, an interesting characteristic should be noted among unpublished decisions addressing disability harassment claims under the ADA in the Ninth Circuit. For example, two cases in this jurisdiction fall into the second category[115] described above in that they assume without deciding that such a claim exists and then deny the claim given insufficient evidence.[116] Another case, in contrast, would belong in the third category[117] described above because it never justifies or explains the existence of a disability harassment claim under the ADA but then

the *Steele* case came down in February 2001, while the *Fox* and *Flowers* cases came down in April and March 2001, respectively.

110. *See supra* notes 77, 80-95 and accompanying text.

111. *See infra* notes 112-20 and accompanying text.

112. There is likely more to the story given the frequency with which disability harassment claims are raised. *See supra* note 59 and accompanying text.

113. *See, e.g.*, Giardina v. Healthnow New York, Inc., No. 00-7196, 2000 WL 1370316, at *1 (2d Cir.) (unpublished decision) (affirming that the disability harassment claim would not be considered on appeal because it was time-barred).

114. *See, e.g.*, FED. CL. CT. R. 52(a); D.C. CIR. R. 28(c); 7TH CIR. R. 53(b)(2)(iv); 9TH CIR. R. 36-3(a); 10TH CIR. R. 36.3(A); 11TH CIR. R. 36-2.

115. *See supra* notes 96-103 and accompanying text.

116. Vawser v. Fred Meyer, Inc., No. 00-36081, 2001 WL 1174084, at *2 (9th Cir.) (unpublished decision); Baumgart v. Washington, No. 98-35172, 1999 WL 535795, at *1 (9th Cir.) (unpublished decision).

117. *See supra* notes 104-10 and accompanying text.

denies the claim due to inadequate evidence.[118] This apparent inconsistency, coupled with the failure to publish any of these decisions, perhaps reflects the inability or the unwillingness of the Ninth Circuit to take a definitive stance on the issue of the cognizance of a disability harassment claim under the ADA.[119] The example of the Ninth Circuit is a microcosm of the hesitance and inconsistency among all but two of the federal circuit courts of appeals as to whether a disability harassment claim exists under the ADA.[120]

B. Is a Disability Harassment Claim Appropriate: ADA Language and Background

Several factors indicate the appropriateness of interpreting that a harassment claim exists under the ADA. In 1993, the EEOC attempted to facilitate a unified policy governing harassment based on "race, color, religion, gender (excluding harassment that is sexual in nature, which is covered by the Commission's Guidelines on Discrimination Because of Sex), national origin, age, or disability" through proposed rules.[121] These

118. Williams v. Boeing Co. No. 97-36098, 1999 WL 50882, at *2 (9th Cir.) (unpublished decision).

119. Such hesitance or indecisiveness contrasts sharply with the Fourth Circuit's clear and definitive stance: "[W]e have little difficulty in concluding that the ADA, like Title VII, creates a cause of action for hostile work environment harassment." Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001).

120. The Fourth and Fifth Circuits explicitly recognized a disability harassment claim under the ADA. *See supra* notes 80-95 and accompanying text.

121. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 (proposed October 1, 1993) (to have been codified at 29 C.F.R. pt. 1609). The proposed guidelines provided in relevant part:

> (a) Harassment on the basis of race, color, religion, gender, national origin, age, or disability constitutes discrimination in the terms, conditions, and privileges of employment and, as such, violates title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. (title VII); the Age Discrimination in Employment Act, as amended, 29 U.S.C. 621 et seq. (ADEA); the Americans with Disabilities Act, 42 U.S.C. 12101 et seq. (ADA); or the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 et seq., as applicable.
>
> (b)(1) Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:
>
> (i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
>
> (ii) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
>
> (iii) Otherwise adversely affects an individual's employment opportunities.
>
> . . . (c) The standard for determining whether verbal or physical conduct relating to race, color, religion, gender, national origin, age, or disability is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive. The "reasonable person" standard includes consideration of the perspective of

rules were heavily influenced by sexual harassment precedent, and sought to apply this framework to several characteristics including disability.[122] Because these rules were never finalized, we are left with the guidelines concerning sexual harassment and less frequent case law and guidelines addressing harassment because of other characteristics.[123] Nonetheless, these EEOC Proposed Guidelines demonstrate the fact that the EEOC interprets harassment to violate the discrimination prohibitions of both Title VII and the ADA because the protected classes of both statutes are included within the same Guidelines.[124]

Second, there are many important parallels between the two statutes. The primary provisions prohibiting discrimination are virtually identical.[125] The ADA adopts the powers, remedies, and procedures provisions of Title VII as its enforcement provisions.[126] The ADA incorporates by reference the definitions of "employee" and "employer" from Title VII.[127] In addition, the principle purposes of the two statutes are very similar.[128] The federal regulations promulgated to interpret and effectuate the ADA also acknowledge the commonality of these two statutes by saying: "Like the Civil Rights Act of 1964 that prohibits discrimination on the bases of race, color, religion, national origin, and sex, the ADA seeks to ensure access to equal employment opportunities based on merit."[129] These factors indicate that the purposes and intent between the two statutes are so similar that the harassment claim already recognized under Title VII should be similarly adopted under the ADA.

C. Development & Purposes of Sexual Harassment Claim Under Title VII

While theoretically there should be a harassment claim under both statutes, harassment under Title VII must be examined in greater detail in order to determine whether it is practicable to transfer Title VII harassment analysis to claims brought under the ADA. As noted above,

> persons of the alleged victim's race, color, religion, gender, national origin, age, or disability. It is not necessary to make an additional showing of psychological harm.

Id. at 51,268-69. For additional analysis of the significance of these proposed guidelines, *see* Ravitch, *supra* note 13, at 1500-02.

122. Ravitch, *supra* note 13 at 1501.

123. *See, e.g.*, 29 C.F.R. § 1606.8 (2001) (national origin harassment); *supra* note 6 and accompanying text.

124. Ravitch, *supra* note 13 at 1502.

125. *See supra* note 86 and accompanying text.

126. *See supra* note 20 and accompanying text.

127. *See supra* note 21 and accompanying text.

128. *See supra* notes 16-17 and accompanying text.

129. 29 C.F.R. § 1630, app. (2002).

Title VII harassment claims originated with reference to race and religion but there is the possibility of harassment claims under Title VII based on any of the five protected classes.[130] Therefore, while it is important to note that harassment claims can be based on several classes, what follows is an examination of sexual harassment as an example of harassment analysis under Title VII.[131]

In the landmark case of *Meritor Savings Bank v. Vinson*,[132] the Supreme Court recognized the existence of both quid pro quo and hostile work environment harassment claims under Section 703(a)(1) of Title VII.[133] The hostile work environment harassment claim is the type that is potentially applicable to disability harassment claims. Hostile work environment harassment is present when "unwelcome sexual conduct . . . 'unreasonably interfer[es] with an individual's job performance' or creates an 'intimidating, hostile, or offensive working environment' . . . even if it leads to no tangible or economic job consequences."[134] The *Vinson* court explained that in order to constitute a statutory violation, the harassment must be "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment."[135]

The EEOC further clarified this holding by outlining factors that are relevant in an evaluation of whether an environment is "hostile": whether the acts were verbal or physical, or both; the frequency of the conduct; whether the acts were "hostile and patently offensive"; whether the accused harasser was a co-worker or a supervisor; whether others participated in the harassing; and whether the acts were directed at more than one person.[136]

Another important component of a sexual harassment claim is the determination of whether the claimed sexual advances were

130. *See supra* note 6 and accompanying text.

131. Sexual harassment was chosen for this part of the analysis because the majority of hostile work environment harassment cases brought under Title VII involve discrimination based on sex. Eichhorn, *supra* note 6, at 580. For the more general discussion of harassment under Title VII, *see supra* notes 47-52.

132. 477 U.S. 57 (1986).

133. *Id.* at 65-66. For the text of Section 703(a)(1), *see supra* note 46. *See also supra* and *infra* notes 49 & 142 and accompanying text for a brief explanation of quid pro quo harassment.

134. SEX DISCRIMINATION, *supra* note 33, at C-2 (1996) (quoting 29 C.F.R. § 1604.11(a)(3)).

135. *Meritor Sav. Bank*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

136. SEX DISCRIMINATION, *supra* note 33, at C-14 (1996). The Supreme Court commented on the EEOC's guidance in this area and described relevant factors in the determination of hostility slightly differently. Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993) ("[T]he frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance.")

"unwelcome."[137] The Court and the EEOC have recognized that this inquiry is often difficult to prove because it is heavily tied to questions of credibility.[138] The Court emphasizes that the proper inquiry is about unwelcomeness rather than about voluntariness of participation in alleged sexual interaction.[139] The EEOC further explains that while each case is evaluated as to unwelcomeness through a case-by-case investigation of the totality of the circumstances, the existence of a contemporaneous complaint is relevant but not determinative.[140]

This case law precedent resembles the federal regulations concerning sexual harassment. These regulations generally define harassment that is in violation of Title VII as, "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature".[141] Such occurrences are considered sexual harassment when one of three conditions are met: (1) participation in such acts becomes a term or condition of an employee's job (quid pro quo); (2) participation or refusal to participate in such conduct is the reason behind employment decisions having an impact on the employee (quid pro quo); or (3) this conduct unreasonably intrudes into the employee's job performance or causes a hostile work environment.[142] The regulations also specify that the EEOC should evaluate charges on a case-by-case basis under a totality of the circumstances.[143]

The Supreme Court elaborated further on the character of the proper hostile work environment sexual harassment claim in the 1993 case, *Harris v. Forklift Systems, Inc.*[144] While first reaffirming the standard laid out in *Vinson*, the Court further explained that the standard has both an objective and a subjective component.[145] More specifically, both a reasonable person *and* the victim must consider the environment to be hostile or abusive.[146] Finally, there need not be proof of "concrete psychological harm" in order to establish a violation so long as the objective and subjective perception requirements are satisfied.[147] These Supreme Court precedents, federal regulations, and additional EEOC

137. *See* 29 C.F.R. § 1604.11(a) (2002) (concerning sexual harassment).

138. *See Meritor Sav. Bank*, 477 U.S. at 68; SEX DISCRIMINATION, *supra* note 33 at C-7 to C-13.

139. *See Meritor Sav. Bank*, 477 U.S. at 68.

140. *See* SEX DISCRIMINATION, *supra* note 33, at C-7 to C-10.

141. 29 C.F.R. § 1604.11(a).

142. *Id.*

143. 29 C.F.R. § 1604.11(b) (2002).

144. 510 U.S. 17 (1993).

145. *Id.* at 21.

146. *Id.* at 21-22.

147. *Id.* at 22; Enforcement Guidance on *Harris v. Forklift Sys., Inc.*, Notice 915.002 (Equal Emp. Opp. Comm'n Mar. 8, 1994), *available at* SEX DISCRIMINATION *supra* note 33, at D-1 (1996).

guidance constitute the body of law that may be adopted, in whole or in part, for the evaluation of allegations of disability harassment claims under the ADA.

D. Does the Sexual Harassment Framework of Title VII Fit into the ADA?

Because of some important differences between Title VII and the ADA, specifically the differences between disability and the five characteristics protected under Title VII, the analysis of sexual harassment claims cannot be wholly adopted for disability harassment claims.[148] Nonetheless, a large portion of the analysis is relevant and appropriate.

Obviously the core of a hostile work environment claim, due to discrimination based on sex or disability, is the frequency and offensiveness of the hostility. Therefore, the EEOC factors[149] can be directly transferred to evaluate whether the conduct was sufficiently hostile to constitute illegal behavior in the disability context. More specifically, the factors can be used to evaluate whether the conduct is verbal or physical and whether the frequency of the conduct would affect the severity of the alleged hostile work environment.[150] Similarly, the factors can be used to evaluate whether the conduct is offensive and whether the perpetrator is a co-worker or a superior influences the impact of it.[151] Finally, the number of alleged harassers and alleged victims alters the harshness of the work environment.[152]

However, two aspects of the hostile work environment analysis do not transfer so cleanly from sexual harassment to disability harassment—the unwelcomeness of the conduct and the dual objective and subjective components of the evaluation of hostility. First, the *Vinson* court noted the necessity of investigating whether participation in the sexual conduct was voluntary or unwelcome.[153] Inherent in this evaluation is the recognition that in some instances, the sexual conduct is consensual for some though others might consider it harassing. In contrast, it is hard to imagine disability harassment as ever being welcome in a comparable way. Nonetheless, this inconsistency in the contexts of sexual harassment

148. For a discussion of the different visions of equality and discrimination of the ADA and Title VII due to the differences between the protected classes of each statute, *see* Eichhorn, *supra* note 6, at 590-95.

149. *See supra* note 136 and accompanying text.

150. *See* SEX DISCRIMINATION, *supra* note 33, at C-14 (1996).

151. *See id.*

152. *See id.*

153. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 68 (1986).

and disability harassment does not frustrate the issue of how disability harassment claims should be analyzed. In fact, it merely demonstrates that an inquiry into unwelcomeness can either simply be removed from the analysis or summarily addressed in the evaluation of disability harassment.

The *Harris* court clarified sexual harassment analysis further by emphasizing that evaluation of the hostility of the work environment should involve both objective and subjective components.[154] Such consideration is appropriately applied to disability harassment claims as well because an objective component can help encourage some uniformity in the disposition of these cases and because a subjective component is necessary to account for the fact that a person with a disability may react to a work environment differently than the average reasonable person as envisioned by the courts.[155] Evaluation of this component, however, will be different than in the Title VII context because of the affirmative requirement of reasonable accommodation.[156] Given this affirmative duty, in some instances failure to accommodate – the lack of action – may contribute to harassment.[157] The assessment of lack of action as potential harassment is wholly inapplicable in the sexual harassment context.

Finally, it should again be noted that while gender is self-evident, claims of any kind raised under the ADA must first include evaluation of whether the claimant is a "qualified individual with a disability" as defined by the ADA.[158] Therefore, any claim for disability harassment should begin with an investigation of whether the claimant meets the statutory definition of disability.[159] Even if the claimant is adjudicated to be a qualified person with a disability, some cases may be complicated by the difficulty of proving that the alleged harasser had knowledge of the claimant's disability and that the disability was the reason behind the harassment.[160]

154. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21-22 (1993).

155. That said, the premise that people with disabilities are different from the generic "reasonable person" reflects a societal marginalization of the people that civil rights statutes are designed to protect. Eichhorn, *supra* note 6, at 622. This issue is discussed further in the Resolution section. *See infra* notes 190-93, 209-10 and accompanying text.

156. *See supra* note 23 and accompanying text.

157. Eichhorn, *supra* note 6, at 632; Ravitch, *supra* note 13, at 1512.

158. 42 U.S.C. § 12111(8) (2001). For the full text of this ADA provision, *see supra* note 28 and accompanying text.

159. Ravitch, *supra* note 13, at 1503.

160. Eichhorn, *supra* note 6, at 624.

E. How Courts Have Analyzed Disability Harassment Claims So Far

While the courts have not been consistent in discussing the existence of a disability harassment claim under the ADA,[161] they have been unified in their proposal of how such a claim would be analyzed. The courts, "[a]ppropriately modifying the parallel Title VII methodology,"[162] specify a multi-part analysis. In order to prove disability harassment the claimant must show that:

> (1) he is a qualified individual with a disability; (2) he was subjected to unwelcome harassment; (3) the harassment was based on his disability; (4) the harassment was sufficiently severe or pervasive to alter a term, condition, or privilege of employment; and (5) some factual basis exists to impute liability for the harassment to the employer.[163]

Some courts elaborate on this test by recognizing the applicability of other components of harassment framework from the sexual harassment context. However, neither *Fox* nor *Flowers*, the only two circuit court cases officially adopting a disability harassment claim,[164] discussed including a subjective and objective component in evaluation.[165] Such consideration can easily be incorporated within the determination of the "unwelcomeness" of harassment under the second prong of the test. Other than that omission, the other aspects of the sexual harassment analysis discussed above are explicitly or implicitly contained within this disability harassment standard: the determination of disability[166] is explicitly in the first prong; the unwelcomeness[167] is explicitly in the third prong; and the EEOC factors[168] can be used to evaluate the severity and pervasiveness of harassment under the fourth prong. Therefore, proposals of analysis of disability harassment by courts so far have been appropriately adjusted to consider the unique aspects of the ADA and disability compared to Title VII.

Finally, it should be noted that, like other employment discrimination claims, a disability harassment claim must be specifically alleged in the claimant's discrimination charge filed with the EEOC.[169] Omission of the

161. *See supra* Part III.A.

162. Fox v. Gen. Motors Corp., 247 F.3d 169, 177 (4th Cir. 2001).

163. *Id.*; *see also* Walton v. Mental Health Ass'n of S.E. Pa., 168 F.3d 661, 667 (3d Cir. 1999); McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1998).

164. *See supra* notes 77, 80-95 and accompanying text.

165. *See supra* note 154 and accompanying text.

166. *See supra* note 158 and accompanying text.

167. *See supra* notes 137-38, 140 and accompanying text.

168. *See supra* note 136 and accompanying text.

169. Kells v. Sinclair Buick—GMC Truck, Inc., 210 F.3d 827, 836-37 (8th Cir. 2000); Dunn v. WGCI AM/FM Radio, 1998 WL 182516, at *5 (N.D. Ill. Apr. 16, 1998).

claim in the charge indicates failure to exhaust administrative remedies and dismissal or summary judgment is appropriate.[170]

IV. RESOLUTION

If and when the courts consistently recognize that a disability harassment claim is cognizable under the ADA, the courts will face the challenge of deciding how such claims should be evaluated. Rather than force Title VII harassment analysis wholesale onto these claims, courts should consider the merits and weaknesses of suggestions debated in the sexual harassment context, namely applying a reasonable woman or reasonable victim standard. By acknowledging the similarities and differences between the sexual harassment and disability harassment contexts, the courts can build an appropriate solution upon the foundation laid by Title VII jurisprudence.

A. Disability Harassment Claims Should Be Cognizable Under the ADA

Surely, the many similarities between the ADA and Title VII encourage courts to find that a disability harassment claim exists under the ADA just as courts have already clearly recognized a harassment claim under Title VII. The purposes of the statutes,[171] the statutory language prohibiting discrimination,[172] similar comments in the legislative history of the statutes,[173] and legal commentary on this issue[174] all support the recognition of a disability harassment cause of action. Indeed, while there is confusion among the federal courts about exactly how to respond to such claims,[175] no federal court has expressly denied this claim.[176] Therefore, a disability harassment claim should clearly lie under the ADA. Hopefully other courts will follow the lead of the Fourth and Fifth Circuits, which in 2001 explicitly recognized that a disability harassment claim is cognizable under the ADA.[177]

After courts acknowledge disability harassment claims, inevitably the next step is resolving the controversy in defining exactly how such a claim should be evaluated. While courts that have addressed the issue have begun the process of adapting Title VII sexual harassment analysis

170. *Kells*, 210 F.3d at 836-37; *Dunn*, 1998 WL 182516, at *5.

171. *See supra* notes 16-17 and accompanying text.

172. *See supra* note 86 and accompanying text.

173. *See supra* notes 16, 22 and accompanying text.

174. *See, e.g.*, Neagle, *supra* note 13, at 737; Ravitch, *supra* note 13, at 1496.

175. *See supra* Part III.A.

176. *See* Walton v. Mental Health Ass'n of S.E. Pa., 168 F.3d 661, 666 n.2 (3d Cir. 1999).

177. Flowers v. S. Reg'l Physician Servs. Inc., 247 F.3d 229, 232 (5th Cir. 2001); Fox v. Gen. Motors Corp., 247 F.3d 169, 176 (4th Cir. 2001).

to disability harassment claims under the ADA,[178] concerns raised by legal commentators reveal that the proper analysis of a disability harassment claim is far from fully resolved.[179]

B. Potential Alternatives to the Reasonable Person Standard

As noted above, the analysis of a harassment claim has a subjective and an objective component, namely the reasonable person standard[180] that is the main point of controversy.[181] Many have indicated the potential inadequacy of the reasonable person standard. In the context of sexual harassment cases, the use of a reasonable woman standard and a reasonable victim standard has been discussed.[182] In the specific area of disability harassment, legal commentators have suggested use of a reasonable person with the same disability standard.[183] Finally, the EEOC Proposed Guidelines on Harassment[184] replace the reasonable person standard with a "reasonable person in the same or similar circumstances" test.[185] Each standard will be briefly discussed in turn.

178. *See supra* Part III.E.

179. *See, e.g.*, Ravitch, *supra* note 13, at 1503-13.

180. *See supra* notes 145-46 and accompanying text.

181. One commentator also has noted that the "severe or pervasive conduct" standard sets a high bar that will make the hostile work environment claim inaccessible to many. Melinda Slusser, Note: *Flowers v. Southern Regional Physician Services: A Step in the Right Direction*, 33 U. TOL. L. REV. 713, 740 (2002). This criticism, however, does not justify a modification of disability harassment analysis until Title VII standards are modified or statutory language or history can be identified to merit lowering this bar.

182. Jolynn Childers, Note: *Is There a Place for a Reasonable Woman in the Law? A Discussion of Recent Developments in Hostile Environment Sexual Harassment*, 42 DUKE L.J. 854, 880, 883, 902-04 (1993). Beyond the sexual harassment context, non-neutral standards have been utilized under other classes protected by Title VII. *See, e.g.*, Duplessis v. Training & Dev. Corp., 835 F. Supp. 671, 677 (D. Me. 1993) (using "reasonable Franco-American" standard for hostile work environment national origin harassment claim); Harris v. Int'l Paper Co., 765 F. Supp. 1509, 1516 (D. Me. 1991) (applying "reasonable black person" standard for hostile environment racial harassment claim).

183. *See, e.g.*, Neagle, *supra* note 13, at 737; Ravitch, *supra* note 13, at 1503-05. Lisa Eichhorn criticizes this suggestion because the fact finder inevitably has difficulty fully understanding and applying the perspective of a person with a particular disability that the fact finder does not have. Instead, she proposes that disability harassment claims apply an objective evaluation of the hostility of the work environment "given the circumstance of the plaintiff's disability." Eichhorn, *supra* note 6, at 622. Because Eichhorn's distinction seems to be one more of semantics than of substance, it is not addressed in a separate section, although her initial criticism is an important one.

184. *See supra* note 118 and accompanying text.

185. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266,51,269 (proposed October 1, 1993).

1. The reasonable woman standard in sexual harassment cases

In the sexual harassment context, there has been discussion of whether analysis of claims should utilize a "reasonable woman" rather than a "reasonable person" standard.[186] The Ninth Circuit applied the reasonable woman standard in *Ellison v. Brady*, reasoning that "[c]onduct that many men [would] consider unobjectionable may offend many women."[187] This is because the reasonable person standard can be applied with a male perspective to reinforce the status quo.[188]

Some commentators argue that the reasonable woman standard is an imperfect solution because this standard ignores the fact that in a small number of cases, the victims of sexual harassment are men.[189] Putting aside this demographic factor, critics have also identified three difficulties created by the reasonable woman standard: the problem in defining the reasonable woman; the "marginalization" that is caused by using a standard premised on difference; and, practically, the old biases that may be tied to such a standard.[190]

First, the reasonable woman standard presumes that women as a group have a definable, unvaried perspective tied to their status as women.[191] Further, establishment of a distinct legal category for women may perpetuate perception of difference between genders that itself may encourage the problem of harassment.[192] Finally, courts may apply this standard through envisioning a woman that is more like a man so that the male perspective is still predominant.[193]

2. The reasonable victim standard in sexual harassment cases

In recognizing these problems with the reasonable woman standard, some legal authors instead suggest the use of a "reasonable victim" standard because the use of a gender-neutral term narrows the potential for bias, marginalization, and reinforcement of traditional gender roles.[194]

186. *See, e.g.*, Childers, *supra* note 182.

187. Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991).

188. Childers, *supra* note 182, at 877.

189. *Id.* at 891-92.

190. *Id.* at 888.

191. *Id.* at 893; Eichhorn, *supra* note 6, at 620.

192. Childers, *supra* note 182, at 895.

193. *Id.* at 900. This statement may seem ridiculous at first glance. It is based, however, on comparison of cases with similar facts, one using the reasonable person standard and the other using the reasonable woman standard, that have the same results. *Id.* at 901. This evaluation reveals the stubbornness of gender bias, perhaps given resentment to singling out one gender as meriting unique analysis that is reflected in the reasonable woman standard.

194. *See, e.g.*, *id.* at 901-02. *But see* Leslie M. Kerns, *A Feminist Perspective: Why Feminists Should Give the Reasonable Woman Standard Another Chance*, 10 COLUM. J. GENDER & L. 195,

Instead, this term emphasizes the power relationship between the parties that may be linked to employment positions, not just gender difference.[195] This refocusing stops a legal analysis from reinforcing the gender-biased thinking that may support incidents of sexual harassment in the first place.

This discussion about the appropriate analysis for sexual harassment is similarly applicable in the disability harassment context. Just as, given traditional gender roles, there may be resentment of female presence in the workplace, employers may resist the presence or the affirmative requirement of reasonable accommodation of people with disabilities. In addition, employers may make unfair and inaccurate assumptions about the capabilities of disabled as well as female employees. Finally, people with disabilities, like women, come to the workplace with a perspective and sensibility that merits acknowledgment even though it is different from the mainstream male perspective.

3. The reasonable person with the same disability standard

Legal commentator Frank Ravitch proposed a modification to Title VII sexual harassment analysis when applied to disability harassment cases under the ADA in order to address the distinctions between the two statutes and contexts.[196] His suggested analysis of disability harassment claims would ask:

> (1) whether the alleged victim is a qualified individual with a disability, and (2) whether the individual was, or is, subject to intimidating, hostile, or abusive conduct based on a known disability, which that individual perceived, and a reasonable person with the same disability would consider, sufficiently severe or pervasive to alter the terms, conditions, or privileges of employment, thereby creating a hostile or abusive work environment.[197]

Ravitch suggested the reasonable person with the same disability standard because the reasonable person standard ignores a fundamental provision of the ADA – the affirmative requirement of reasonable accommodation[198] – that inherently examines the individual needs of each employee.[199]

196-97 (2001) (arguing that the reasonable woman standard is preferable in sexual harassment cases precisely because its gender specificity focuses attention on gender roles and gender bias that encourage sexual harassment).

195. Childers, *supra* note 182, at 902.

196. Ravitch, *supra* note 13, at 1503-05.

197. *Id.* at 1504-05.

198. *See supra* note 23 and accompanying text.

199. Ravitch, *supra* note 13, at 1508.

Just as the reasonable woman standard seeks to highlight the unique sensibilities of women, Ravitch's standard of a reasonable person with the same disability focuses attention on the unique perspective of people with disabilities. Therefore, Ravitch's proposal can be evaluated with respect to the criticisms raised above about the reasonable woman standard.[200] First, Ravitch's standard partially relieves the definitional criticism levied against the reasonable woman standard: it considers the diversity within the group of people with disabilities by specifying the *same* disability, thus at least narrowing interpretation to be more in line with an individual plaintiff. Courts would still face the difficulty of discerning what, for example, a reasonable blind person versus a reasonable paraplegic may feel.[201]

Second, like the reasonable woman standard, however, it also by its very name emphasizes the making of a distinction between people with disabilities and people without disabilities under the law. Given the negative perception of the ADA as an unfair windfall to plaintiffs with disabilities,[202] such a distinction may invoke negative connotations. As such, Ravitch's standard may further marginalize people with disabilities, which may then encourage perceptions that facilitate harassment.

Third, by explicitly identifying a distinct legal category for people with disabilities, ingrained biases may be triggered. However, this criticism does not have as much force as it does in the gender context because the ADA, as a civil rights statute, addresses only people with disabilities so that as a class they have already been singularly distinguished under the law. While the ADA is very similar to protections for the five classes of persons covered by Title VII, there are differences, including the affirmative requirement of reasonable accommodation and the evaluation of whether a plaintiff is a qualified person with a disability.[203] Therefore, in sum, all three criticisms of the reasonable woman standard are also applicable to the reasonable person with the same disability standard, in varying degrees. Nonetheless, Ravitch's standard is a useful step towards recognizing the importance of considering the unique sensibilities of the plaintiffs in disability harassment cases.

200. *See supra* Part IV.B.1.

201. *See* Eichhorn, *supra* note 6, at 621-22.

202. *See supra* notes 212-13 and accompanying text.

203. *See supra* notes 20-35 and accompanying text.

4. The reasonable person in the same or similar circumstances standard

The EEOC Proposed Guidelines[204] provide a different way to slightly modify the reasonable person standard through the suggestion of the reasonable person in the same or similar circumstances standard.[205] The Guidelines explicitly explain that evaluation with this standard "includes consideration of the perspective of persons of the alleged victim's race, color, religion, gender, national origin, age, or disability."[206]

This standard is very similar to language recently used by the U.S. Supreme Court in evaluating a same-sex harassment case: "Common sense, and an appropriate sensitivity to social context, will enable courts and juries to distinguish between simple teasing or roughhousing among members of the same sex, and conduct which a *reasonable person in the plaintiff's position* would find severely hostile or abusive."[207]

Thus, both the EEOC and the U.S. Supreme Court have used language modifying "reasonable person" to encourage the consideration of the specific circumstances of an individual plaintiff using neutral terms much like the proposed reasonable victim standard. However, these two formulations lack the emotional punch of the term "reasonable victim." The reasonable victim standard, unlike these proposals, emphasizes the power differential and the alleged harassment that is central to the claim.[208]

C. A Proposal: The Reasonable Victim Standard in Disability Harassment Cases

Given that many of the same criticisms of the reasonable woman standard are present for the reasonable person with the same disabilities standard, the reasonable victim standard proposal should be considered in the disability harassment context as well. The use of a disability-neutral term diverts focus from the potential for marginalization or bias.[209] As a result, this legal test emphasizes the alleged harassment – the victimization – rather than a characteristic of the employee that itself

204. *See supra* notes 121-24.

205. Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 58 Fed. Reg. 51,266 at 51,269 (to be codified 29 C.F.R. § 300).

206. *Id.*

207. Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 82 (1998) (emphasis added). In addition, this passage encourages "appropriate sensitivity to social context," which seems to indicate that some consideration of the plaintiff's subjective perspective is appropriate. *Id.* Michael J. Frank, *The Social Context Variable in Hostile Environment Litigation*, 77 NOTRE DAME L. REV. 437, 437 (2002).

208. *See supra* note 195 and accompanying text.

209. *See supra* note 194 and accompanying text.

may have stimulated the biases that encouraged the alleged harassment.[210] This neutrality can also facilitate harmonization in the standards applied to all protected classes under the ADA and Title VII. The reasonable victim standard focuses on the power disparity in the employment relationship on an individualized basis more effectively than the reasonable person in the same or similar circumstances standard.

Disability, like gender, is not something to be ashamed of. The purpose of the reasonable victim standard is not to obscure these qualities, but to centralize the analysis on the interaction between the parties. In applying this standard, courts will consider many factors affecting the individual perspective of a victim, including his or her disability. Therefore, the claimant's disability still constitutes one factor in evaluating the severity and pervasiveness of the hostile work environment.

In addition, the reasonable victim standard, if adopted in the disability harassment context, is potentially also applicable to other protected classes, including gender. There would be more harmonization and clarity of analysis, specifically of disability harassment claims, if the same analysis is used in the context of other types of harassment. The U.S. Supreme Court has encouraged facilitating uniformity among analysis of harassment based on different characteristics.[211] This uniformity is appropriate given the large overlap in statutory language, interpretation, and application of Title VII and the ADA discussed throughout this article.

V. CONCLUSION

The ADA has been the subject of media portrayal as a windfall statute for plaintiffs, some of whom may have questionable disabilities, which encourages frivolous litigation.[212] In addition to denouncing the high volume of lawsuits, critics also have attacked the cost of reasonable accommodation.[213] Unfortunately, these portrayals of the ADA demonstrate a bias against the statute that may discourage courts from expanding its enforcement, for example, through expressly recognizing another cause of action such as disability harassment. Instead of focusing on the cost of accommodation, naysayers should consider the estimated $200 to $300 billion cost to the U.S. economy in support payments and

210. *See supra* note 192 and accompanying text.

211. Faragher v. City of Boca Raton, 524 U.S. 775, 787 n.1 (1998).

212. Ruth Colker, *The Americans with Disabilities Act: A Windfall for Defendants*, 34 HARV. C.R.-C.L. L. REV. 99, 99 (1999).

213. WALTER OLSON, THE EXCUSE FACTORY: HOW EMPLOYMENT LAW IS PARALYZING THE AMERICAN WORKPLACE 102-03 (1997).

lost productivity because the skills of people with disabilities are underutilized in the workforce,[214] likely in part to virtually unchecked instances of workplace hostility.

In order to buttress the contention that a disability harassment claim should be cognizable under the ADA, it should be noted that statistics reveal that the ADA has so far provided little relief for plaintiffs. Defendants win more than 93% of reported ADA employment discrimination cases decided on the merits in trial courts; defendants also win in 84% of cases that are appealed.[215] These statistics reveal less success by plaintiffs than in comparative areas of the law, with only prisoner rights cases having a similarly low rate of success.[216] Therefore, courts should not be hesitant because of misguided public opinion to implement the ADA to its full extent.

The many and important similarities between Title VII and the ADA clearly indicate the need for and the appropriateness of finding that a disability harassment claim is cognizable under the ADA in that such claims are similar to harassment claims already recognized under Title VII. While most courts have hesitated to endorse this disability harassment claim, the difficult aspect of this issue remains determining exactly how such a claim should be analyzed. Given a few key differences between Title VII and the ADA, most notably the affirmative requirement of reasonable accommodation, harassment analysis under Title VII cannot be wholly transferred to the ADA context. Incorporating the reasonable victim standard into this analysis helps address these inconsistencies.

214. Ben Cristal, *Going Beyond the Judicially Prescribed Boundaries of the Americans with Disabilities Act*, 13 HOFSTRA LAB. L.J. 493, 495 (1996). Put another way, a 1998 survey revealed that 26.6% of people with disabilities were employed, while 78.4% of the non-disabled were employed. Susan Schwochau & Peter David Blanck, *Economics of the Americans with Disabilities Act, Part III: Does the ADA Disable the Disabled?*, 21 BERKELEY J. EMP. & LAB. L. 271, 272 (2000).

215. Colker, *supra* note 212, at 100.

216. *Id.* The comparable cases examined were also employment discrimination cases. *Id.* at 100 n.10.